Supreme Court of the United States.

CHARLES COUDERT, as Ancillary Executor of the Last Will and Testament of RAPHAEL MADRAZO, deceased,

Plaintiff in Error,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

Brought up by writ of error to the U. S. Circuit Court of Appeals for the Second Circuit, this case raises the question whether the said Court *erred* in reversing the judgment theretofore rendered by the U. S. Circuit Court for the Southern District of New York in favor of Coudert, as Executor of Madrazo, the plaintiff in error here, and directing the said Circuit Court to award judgment in favor of the United States (plaintiffs in error in the said Circuit Court of Appeals, and defendants in error here).

The question of law involved is, whether, in this proceeding under the "Tucker" Act (Law of March 3, 1887: 24 Statutes at Large, 505), the United States could and should be held liable to the Executor of Madrazo, deceased, for the *unpaid balance* of the proceeds of the Spanish bark *Teresita*, belonging to Madrazo, which was seized during the war of the Rebellion by the United States vessel *Granite City* for

alleged breach of blockade, and sold pending proceedings in prize, but of which *restitution* was ordered, first by the District Court, and finally, on appeal, by this Court (5 Wallace, 180).

The question is raised under the following circumstances:

"Pending an adjudication of the question whether or "not the bark *Teresita* had so violated the blockade, "the said bark and her cargo were sold by the U. S. "Marshal for the Eastern District of Louisiana, by "virtue of an order of the U. S. District Court for "the Eastern District of Louisiana, dated August 23, "1864, rendered in a suit in admiralty for the con-"demnation and forfeiture of said vessel and her "cargo, which was commenced in said Court on "December 16, 1863, and in which the United States "of America were libellants, and the proceeds of such "sales, after deducting costs, fees, commissions and "other charges, and thus leaving the sum of "$10,359.20, was *pursuant to a regulation of the "Treasury Department of the United States then in "force*, deposited by the said Marshal in the First "National Bank of New Orleans, Louisiana, *then a "special or designated depositary of public moneys of "the United States*, to await the further orders of the "Court" (*Second Finding of Fact*, Record, p. 13).

"Such proceedings were thereafter had * * * "that the said District Court pronounced its judgment "or decree, declaring the said capture unlawful, and "therefore directed *restitution* of the said vessel and "cargo to her said owner." * * * (*Third Finding of Fact*, Record, p. 13).

"* * * The said United States appealed there-"from to the Supreme Court of the United States, "and caused a supersedeas or stay of execution of the "said judgment or decree to be issued and effected, "pending the hearing of the said appeal * * *" (*Fourth Finding of Fact*, Record, p. 13).

"* * * At the December Term of that Court "held in the year 1866, and after due argument and "consideration the said Supreme Court of the United

"States delivered its opinion and judgment in the "said cause, affirming the said judgment or decree" (of restitution), "and thereupon issued its mandate to "carry the same into effect * * *" (*Fifth Finding of Fact*, Record, p. 13).

That under and by virtue of the said decree of restitution, five several partial payments were made, on account of the said net proceeds of the vessel and cargo, by the Receiver of the said First National Bank of New Orleans, to the said Rafael Madrazo, during his life, and his representatives after his death; such payments having been made in the amounts, and at the dates, following (respectively):

May 1, 1871	$1,553 88
Dec. 22, 1871	2,071 84
April 28, 1874	3,107 76
October 31, 1879	517 96
September 28, 1882	932 33
Making a total of	$8,183 77

which *left unpaid*, of the said net proceeds of the vessel and cargo, a balance of $2,175.43 (*Sixth and Seventh Findings*, Record, p. 14).

By the last of said partial payments, namely, the dividend of $932.33, made on September 28, 1882, the Receiver of the said National Bank exhausted the entire proportion of the assets of the said Bank, corresponding to the deposit so theretofore made as aforesaid of the net proceeds of the vessel and cargo (*Eighth Finding*, Record, p. 14).

Within six years of the date of the said last payment on account of the said net proceeds of the vessel and cargo, to wit: on the 24th day of September, 1888, the Executor of said Madrazo filed his petition under the Act of March 3, 1887 (24th Statute at Large, 505; 1 Supplement Revised Statutes, 559), commonly known as the "Tucker Act," to claim the balance (Record, p. 6).

On the facts above recited, the Circuit Court, under date of Nov. 5, 1894, gave judgment for the claimant

for $3,818.07 (being the unpaid balance claimed plus interest on the same, as the disbursements in the action).

On May 12, 1896, the Circuit Court of Appeals reversed said judgment and *ordered judgment in favor of the United States* (Record, p. 20).

Assignment of Error.

"That the Court reversed the judgment of the Circuit Court of the United States for the Southern "District of New York, and directed said Court to "award judgment in favor of the above-named plaintiff in error" (the United States) "whereas by right "and by the laws of the land the said writ of error "should have been dismissed or the said judgment "affirmed."

Brief of the Argument.

I.—Under the law applicable to such a case as that presented by the record in this case, the net proceeds of the vessel and cargo must be deemed to have been had and received by the United States, by its payment, in accordance with law, into the Treasury of the United States, and, consequently, a sum of money equal to the *whole* of such net proceeds, must be held to have become payable to the claimant, by the United States, under the decree of restitution, wholly irrespective of any loss of particular *assets* of the Treasury through the failure of a "designated depositary" bank.

II.—The vessel and cargo, and, afterwards, the net proceeds of the sale thereof, having been held by the Government *as trustee* for those who, by the decree of the Court, should be held to have the ultimate right to it, it was not until *after such trustee in some way disavowed the trust*, which it did not do until after it ceased to make payments on account of such proceeds, on the

28th day of September, 1882, that the *cause of action* embodied in this claim really arose. Accordingly, as this proceeding was commenced on the 24th day of September, 1888, or clearly within 'six years' of the time in question, the claim is *not* barred by the limitation prescribed in the statute.

III.—The objection made to the judgment of the Circuit Court (the reversal of which is now under review) on the ground that in computing the claimant's "*damages*" the Circuit Court took into consideration the *length of time during which the wrongful withholding of the balance due continued*, and so made the *damages* larger by an amount which it called "interest," may not be so *certainly* a *sound* objection as the counsel for the Government seems to have deemed it in the Court below. But even assuming, for the sake of the argument, that the objection *is* really a sound one, and that the Circuit Court erred in computing into the sum allowed as damages the amount which it called "interest," this circumstance would not, in and of itself, require or justify the judgment of the Circuit Court of Appeals ordering *judgment in favor of the United States.* At the *utmost*, the recognition of this alleged error as to "interest" need have led only to a reduction of the *amount* of the judgment to the extent of the sum improperly allowed.

POINTS.

I.

Under the law applicable to such a case as that presented by the record in this case, the net proceeds of the vessel and cargo must be deemed to have been had and received by the United States, by their payment, in accordance with law, into the Treasury of the United States; and, consequently, a sum of money equal to the whole of such net proceeds must be held to have become payable to the claimant by the United States, under the decree of "restitution," wholly irrespective of any loss of particular assets of the Treasury through the failure of a "designated depositary" bank.

The foregoing proposition ("Point I") formulates the contention of the claimant as to the question at issue in this case, upon the *merits*.

The argument of the learned U. S. District Attorney for the Southern District of New York in opposition to the claim, and the opinion of the learned Circuit Court of Appeals seeking to justify that judgment against the claimant, which is now under review, *both* proceeded upon the assumption that, in the decision of this case, the Court must treat the net proceeds of the Marshal's sale of the *Teresita* and her cargo, as NOT having been "paid into the Treasury of the United States," but simply as being "money in *Court*," in the ordinary sense. And both the learned District Attorney and the Court accordingly relied upon the decision of this learned Court in the *Branch* case (100 U. S., 673), as a decision upon an exactly analagous case, which conclusively settled the law governing this case, adversely to the claimant.

That is to say, on the *merits*, the Circuit Court of Appeals ordered judgment for the United States (thus finally rejecting the claim), upon the one ground described, and which is set forth as follows, in the opinion of the Court (*Record*, p. 18, folio 29).

"The theory of the petitioner," says the opinion, "is that inasmuch as the final decree in the prize case "directed the Government to make restitution of the "*Teresita* and her cargo, and as the decree has not "been fully complied with, a claim sounding in con- "tract has arisen out of said decree, in favor of "the decedent and his estate, against the Government. "This theory *omits consideration* of the facts that the "vessel and her cargo were sold by order of the Dis- "trict Court, that the proceeds of such sale remained "subject to its order in lieu of the vessel and cargo, "*that the fund was not deposited in the Treasury of* "*the United States and that the Government is not re-* "*sponsible for its diminution.* A similar claim against "the United States, arising out of the failure of a bank "in which the proceeds from the sale of cotton *seized* "*under the* CONFISCATION ACT" (*nota bene*) "had been de- "posited, was examined by the Supreme Court in Branch "*v.* U. S. (100 U. S., 673). The suit for condemnation "of the cotton had been dismissed and judgment had "been entered for the defendants, who thereupon "brought suit against the United States to recover the "unpaid amount of the original deposit. The Su- "preme Court held that the money which had been "deposited belonged for the time to the District Court "as a trust fund, that it was not paid into the Treasury, "and that, *therefore*, the claimant was not entitled to "recover. In this case, also, the entire proceedings in "regard to the sale of vessel and cargo and their pro- "ceeds having been taken by the District Court, the "Government is not responsible any more than was "the petitioner or the decedent, for any calamity to "the fund. The decree of restitution of the vessel "and cargo was a decree for *whatever remained of the* "*fund* which was a substitute for the vessel and "cargo." (*Record*, p. 18, folio 29.)

Such, then, is the learned Court's criticism of the claimant's "theory": "This theory," says the Court "*omits consideration* of the facts (1), that the vessel "and her cargo were sold by order of the District "Court (2), that the proceeds of sale remained subject "to its order in lieu of the vessel and cargo, (3), that "the fund was not deposited in the Treasury of the "United States, and (4), that the Government is not "responsible for its diminution."

Under the circumstances the statement that our theory "omits consideration" of "facts" "(1)," and "(2)," must have meant that our theory was *inconsistent* with the "facts" in question. (Taken *literally*, nothing could be more absurdly untrue, on the face of the record, and claimant's brief, than the statement that the claimant's position "omits consideration" of the very "facts" upon which that position is *expressly* BASED!) The learned Court evidently meant to argue thus:—INASMUCH *as* "the vessel and cargo were sold by order of the District Court," and "the proceeds of sale remained subject to its order in lieu of the vessel and cargo," the *legal* INFERENCE must be (there certainly was neither *evidence* nor a *finding of fact* to this effect), that "the fund was *not* deposited in the Treasury of "the United States and (*hence*), that the Government "is not responsible for its diminution."

Such being unquestionably the argument against us, we respectfully but unhesitatingly assert that it embodies, or consists of an absolute *non sequitur*.

The *Teresita* and her cargo having been sold in *prize* proceedings, (in 1864) the *legal* PRESUMPTION is (and there is nothing in the record to contradict it), *that the proceeds of the sale were deposited in the Treasury of the United States*, it having been *the positive* REQUIREMENT *of the* LAW, that such proceeds of "prize" SHOULD be so deposited in the Treasury of the United States.

"Since the act of Congresss of the 3d of March, 1849," said the Supreme Court of the United States, "it appears to be the intention and the positive man- "date of Congress, that ALL *prize money arising from* "*captures by vessls of the navy of the United States*,

" *whether received by marshals for the sale of prizes*, or " in the hands of prize agents, should be deposited in the " Treasury of the United States. *Vide* § 8th of the act, " Stats. at Large, Vol. IX, p. 378."

Jecker et al. v. *Montgomery*, 59 U. S., 125.

" Sec. 8. *And be it further enacted*, That from and " after the passage of this act, *all prize money*, arising " from captures made by the vessels of the navy of " the United States, received by the marshal who " shall make sale of such prizes, shall, within sixty " days after such sale, *deposit the net proceeds*, after " paying all charges, as now provided by law, into " the treasury of the United States,"

9 *Stats. at Large*, p. 378, Sec. 8.

An act of Congress approved March 3, 1863, entitled " *An Act further to regulate Proceedings in Prize* " *Cases, and to amend various acts of Congress in* " *Relation thereto*," provided as follows:

" *Be it enacted by the Senate and House of Repre-* " *sentatives of the United States of America in Con-* " *gress assembled*, That whenever ANY *prize property* " shall be condemned in any district or circuit court, " or shall *at any stage of the proceedings* be found by " the court to be perishing, perishable, or liable to de- " teriorate or depreciate, or whenever the costs of " keeping the same shall be disproportionate to its " value, or whenever all the parties in interest who " have appeared in the case shall agree thereto, it shall " be the duty of the court to order a sale thereof, and " no appeal shall operate to prevent the making or exe- " cution of such order. And upon any sale, *it shall* " *be the* DUTY *of the marshall forthwith to deposit the* " *gross proceeds of the sale with the Assistant* TREASURER " *of the United States nearest to the place of sale*, and " *subject to the order of the court in the particular* " *case;* and *the court may at any time order the pay-* " *ment from such deposit* of the expenses and disburse- " ments necessarily incurred in the custody, preserva-

" tion, and sale of said property, audited and allowed " by the court in the manner provided by law."

Chapter 86, Laws of 1863, Sec. 1 (12 U. S. Stats. at Large, p. 759).

(See also § 2 of the same act, as further illustrating the policy).

An act of Congress, approved June 30, 1864, and entitled: "*An Act to regulate Prize Proceedings and the distribution of Prize Money, and for other purposes,*" contained the following provisions:

" SEC. 7. *And be it further enacted*, That the mar- " shal shall safely keep ALL *prize property* under war- " rant from the Court, and shall report to the Court " any cargo or other property that he thinks requires " to be unladen and stored, or to be *sold*. He shall " insure prize property if, in his judgment, it is for the " interest of all concerned. * * * If a sale of prop- " erty is ordered, he shall sell the same in the manner " required by the Court, and collect the purchase mo- " ney, and *forthwith deposit the gross proceeds of the* " *sale with the Assistant Treasurer of the United States* " *nearest the place of sale*, subject to the order of the " Court in the particular cause."

Chapter 174, Laws of 1864 (13 U. S. Stats. at Large, p. 308.)

(See also end of Section 1 of the same statute).

This legislation (which, indeed, has apparently not been substantially amended since) was in force, in this form, during the entire course of the prize proceedings against the *Teresita*.

The legal presumption is that the Marshal did his duty.

Gonzalez v. *Ross*, 120 U. S., 605;

Nofire v. *U. S.*, 164 U. S., 660;

Bank of U. S. v. *Daxbridge*, 12 Wheat., 64, 70;

Rankin v. *Hoyt*, 4 How. 327;
Butler v. *Maples*, 9 Wall., 766;
Weyawega v. *Ayling*, 99 U. S., 112;
Callaghan v. *Myers*, 128 U. S., 617;
Keyser v. *Hitz*, 133 U. S., 138;
Knox County v. *Ninth National Bank*, 147 U. S., 91, 97.

Not only is there nothing in the case to offset the presumption of the correctness and legality of official action, but, on the contrary, the *Findings of Fact* in the record (even as amended at the solicitation of the District Attorney), affirmatively *confirm* the presumption, by reciting, in so many words, that "the *proceeds of such sale* * * * the sum of $10,359.20, *was*, PURSUANT TO A REGULATION OF THE TREASURY DEPARTMENT *of the United States then in force, deposited by the said Marshal in the First National Bank of New Orleans, then a special or* DESIGNATED DEPOSITARY *of* PUBLIC MONEYS *of the United States.*"

(*Second Finding of Fact*, Record, p. 13.)

Such "designated depositaries" are distinctly recognized as parts of the regular machinery of the Treasury, in the Title on the "Department of the Treasury" in the Revised Stututes."

Title VII., Chapt. Five, §§ 306, 310.

The theory of the learned Circuit Court of Appeals "omits consideration of the facts" that *the law* REQUIRED the deposit of the proceeds of PRIZE property in the Treasury of the United States, *pending proceedings*, and that, *in the light of this requirement*, the fact recited in the *findings* of the learned Circuit Judge—that the deposit was made "*pursuant to a regulation of the Treasury Department then in force, in a 'designated depositary of public moneys,'*"—establishes the correctness of the claimant's view, having a significance and effect which, *by itself*, and in the *absence* of such a "positive mandate" of Congress, the fact in question would certainly not have had.

The "Confiscation Act" under which the *Branch*

case was decided (100 U. S., 673) contained no analogous provision for the deposit in the Treasury, *pendente lite*, of the proceeds of property seized but *not yet finally condemned*. It was only the proceeds of property which had been *finally condemned* as properly confiscated, that *that* legislation directed the deposit of in the Treasury. Accordingly, in a case under that act—such as the *Branch* case was—it was, *of course*, true that the *mere* circumstance that money (which had *not* been finally condemned) had been, *pending* proceedings, deposited by the Marshal in a bank which happened to be a "designated depositary," did not, in and of itself, make the deposit there a deposit in the Treasury, or transform the money into Government assets. *Under such circumstances*, it is *of course* true that, as this learned Court declared, "no officer of the United "States can charge the Government with liability for "moneys in his hands *not* public moneys by depositing "them to his own credit in a bank designated as a depositary." But, in *prize* cases, and therefore in the *Teresita* case, *the express and repeated* enactments *of* Congress—*not* the volunteered and unauthorized act of an "*officer*" of the United States—had established it as the Government's *policy* to receive into the Treasury, *pending* proceedings for condemnation, the proceeds of "prize property." By this policy—*one by no means confined to this sort of case*—the United States, *conscious of its own absolute solvency*, and *sensibly exploiting in the public interest its perfect ability to have the amounts forthcoming whenever the time should come for finally applying them*, has received such sums *into*, and *as assets of*, its Treasury, as banks receive the "general deposits" of their customers, and *with the same benefit which banks derive from this sagacious practice*—namely, the securing thereby, *without interest*, of assets available for their purposes; the securing, in other words, of a *non-interest bearing* Loan to the amount of the sums in question. (In view of the fact that *even though* it has *thus been aided by many receipts upon which no interest was payable*, the Government has *still* felt called upon to anticipate its

revenues from taxation, by huge *interest bearing* "*loans*," the policy described is seen to be, not an eccentricity not lightly to be imputed to the Government, but, on the contrary, *so clearly the obviously wise and practical policy* that its *non*-adoption would have been almost criminally foolish, and its adoption so likely, so *presumable*, that far less explicit legislation than that cited might well have been accepted by this Court as sufficiently establishing its enactment).

Of course, with the Treasury as with the Banks, it is an absolutely indispensable condition of this most profitable practice—of this exploiting of the *responsibility* of the institution—that in point of fact the sums received as deposits and so mingled with and made a part of the available 'cash' *assets* of the Treasury or Bank (as the case may be), SHALL *be* "*forthcoming*" *at the proper time*, as in fulfilment of an *obligation* of the institution, *wholly unaffected* by the circumstances that *a loss* or diminution of assets may have been incurred through the insolvency of *a bank in which the Treasury kept an account.* (It is, indeed, only with reference to a case in which deposit in the Treasury is held *not* to have been made, that the responsibility of the Government is denied, either in the *Branch* case, or by the learned Circuit Court of Appeals).

The fact that the deposit is to be "*subject to the order of the Court in the particular cause*" implies nothing inconsistent with the view that it *was* a "DEPOSIT," *in the usual sense of the word.* It certainly was not a *storing*, in a "safe deposit box," of concrete, *particular coins or bills*, to be *identically*, *specifically* RETURNED on the order of the Court. "The Court" was simply to have a *credit in* ACCOUNT with this *branch* of the *Government bank* (so to speak), and the fact that it was *that* "account" (instead of some other) that was to be opened by the transaction, is no more inconsistent with the money's having been received by the Treasury *on precisely the same basis on which a private bank receives its general* "*deposits*," than, in the case of the latter, the circumstance that

the *amount* of every such general deposit is credited in *some* account, and is "subject to the order" of the person to whose credit it is placed, is inconsistent with the money's having by the deposit, become the *property* of the bank, while the latter, by so accepting it, incurs the obligation to *pay the* AMOUNT (NOT *to return the specific coins or bills deposited*). Having, by its armed vessel, forcibly (and, as its own Courts decided, unlawfully) seized the *Teresita* and its cargo; *compelled* their sale by *its* marshal, and *the "deposit" of the proceeds with its "assistant* TREASURER," *in its "designated depositary of* PUBLIC MONEYS"—thereby enabling and authorizing its Treasury to draw upon that depositary for just so much more money, for *any* purpose—the United States could not decently do less than make itself responsible for the *amount* so taken and mingled with its own assets. This responsibility was provided for by the enactment giving the Court which was to pass upon the rights of claimants to the "prize property," a CREDIT *for the* AMOUNT, upon the appropriate branch of the Treasury.

The enactment in question was in effect *an* APPROPRIATION *of moneys in the Treasury*, to the amount of the "proceeds" of which restitution might be ordered. If it was made payable through a particular "depositary of public moneys," this was only for the same reasons of convenience in book-keeping, &c., which leads to the making of *money-orders* payable only at a designated P. O. money-order office, though, (unquestionably) only actual *payment* of the whole amount would discharge the Government's obligation in the matter, and a defalcation by the particular postmaster concerned would not be deemed an excuse for a failure to pay the whole sum due.

Surely—we most respectfully submit—the foregoing considerations fully justify our claim, upon the *merits*, that, "under the *law* applicable to such a case as that presented by the record in this case, the net proceeds of the vessel and cargo must be deemed to have been 'had and received' by the United States, *through their having been paid*, IN ACCORDANCE WITH LAW, *into the*

Treasury of the United States; and, consequently, a sum of money equal to the *whole* of such proceeds must be held to have become payable to the claimant by the United States, under the decree of 'restitution,' *wholly irrespective of any loss of particular* ASSETS *of the Treasury through the failure of a 'designated depository' bank.*"

II.

The vessel and cargo, and afterwards the net proceeds of the sale thereof, having been held by the Government "as Trustee" for those who by the decree of the Court should be held to have the ultimate right to it was not until after such Trustee in some way disavowed the trust—which it did not do until after it ceased (on September 28, 1882), to make payments on account of such proceeds, and declined to recognize our demand for the balance—that the cause of action embodied in this claim really arose. Accordingly as this proceeding was commenced on the 24th day of September, 1888, or clearly within "six years" of the time in question, the claim is not "barred" by the limitation prescribed in the statute.

The principle which the foregoing proposition applies to the present case has heretofore, *in a strictly analogous sort of case*, been expressly recognized and practically applied, by this learned Court. As was said in an opinion of the Court of Claims *quoted* in *Rice* v. *United States* (127 U. S., 620): "In *Taylor's case*, 104 U. S., 216, 222, the SUPREME COURT *called the United States* "TRUSTEES" of the surplus money paid into

the Treasury from the sales of lands for taxes under the direct tax acts (12 Stats., 292, 422, 640; 14 Stat., 568) over and above that which was required to pay the tax, interest and costs. That Court did not treat the case as one in equity, and upon a finding of facts by this Court, as in cases at law, they held, as to the Statute of Limitations, that 'the right of the owner of the land to recover the money which the government held for him as his trustee, did not become a claim on which suit could be brought, and such as was cognizable by the Court of Claims, until demand therefor had been made at the Treasury. Upon such demand the claim first accrued,' and that statute began to run."

In the case referred to we find the following:

"The second question raised by the appeal is whether "the Court of Claims had jurisdiction of a suit for "such proceeds, *when the application to the Secretary "of the Treasury, and the bringing of the suit therefor, "were both more than six years after the sale.*"

"Sect. 1069 of the Revised Statutes provides that "every claim against the United States cognizable by "the Court of Claims shall be forever barred, unless "the petition setting forth a statement thereof is filed "in the Court within six years after the claim first "accrues.

"The thirty-sixth section of the act of 1861 re-"quired, as we have seen, the surplus proceeds of the "sale of land for taxes to be deposited in the Treasury, "to be there held for the use of the owner or his legal "representatives until he or they should make appli-"cation therefor to the Secretary of the Treasury, "who, upon such application, should, by warrant on "the Treasury, cause the same to be paid to the ap-"plicant."

"This section limits no time within which applica-"tion must be made for the proceeds of the sale. The "Secretary of the Treasury was not authorized to fix "such a limit. It was his duty, whenever the owner "of the land or his legal representatives should apply "for the money, to draw a warrant therefor without

" regard to the period which had elapsed since the sale. " The fact that six or any other number of years had " passed did not authorize him to refuse payment. " *The person* ENTITLED TO THE MONEY *could allow it to* " *remain in the Treasury for an indefinite period with-* " *out losing his right to demand and receive it.* It " follows that if he was not required to *demand it* " within six years, he was not required to *sue for it* " within that time."

" *A construction consistent with* GOOD FAITH *on the* " *part of the United States should be given to these* " *statutes.*" (*Nota bene.*) " It would certainly not be " fair dealing for the Government to say to the owner " that the surplus proceeds should be held in the " treasury for an indefinite period for his use or that " of his legal representatives, and then, upon suit " brought to recover them, to plead in bar that the " demand therefor had not been made within six " years."

" *The general rule is* that *when a trustee unequivocally* " *repudiates the trust* and *claims* to hold his own, *and* " *such repudiation and claim are brought to the knowl-* " *edge of the cestui-que-trust in such manner that he* " *is called upon to assert his rights,* the Statute of " Limitations will begin to run against him *from the* " *time such knowledge is brought home to him, and* NOT " BEFORE. *Merriam* v. *Hassan,* 14 Allen (Mass.), 516; " *Baker* v. *Whiting,* 3 Sumn., 486; *Kane* v. *Blood-* " *good,* 7 Johns. (N. Y.), Ch. 90; *Attorney General* v. " *Proprietors of the Meeting House in Federal Street* " *in Boston,* 3 Gray (Mass.); *Bright* v. *Segerton,* 2 De- " G., F. & J., 606; *Wedderburn* v. *Wedderburn,* 2 " Keen, 722."

" *In analogy to this* RULE the right of the owner of " the land to recover the money which the government " held for him as his trustee did not become a claim " on which suit could be brought, and such as was " cognizable by the Court of Claims, until demand " thereof had been made at the treasury. Upon such " demand the claim first accrued. As the suit was " brought within six years from the date of demand,

" it falls within the terms of the section giving juris-
" diction to the Court of Claims, and is not cut off by
" the lapse of time."

United States v. *Taylor*, 104 U. S., 221, 222.
Cited with approval in *U. S.* v. *Wardwell*,
172 U. S., 56.

" The contention of the appellant is, that if the title
" was conveyed as security, then the instruments cre-
" ated simply a mortgage; and that the rule in Cali-
" fornia, from which State Utah took its statues, is
" that when action on the *debt* is barred, action on the
" *mortgage* given to secure the debt is *also* barred. The
" obvious answer is that these instruments did not
" create a mortgage, *but an active and express trust*,
" *and the rule invoked as to mortgages does not apply*,
" *either in California* OR ELSWHERE. In *Miles* v. *Thorne*,
" 38 California, 335, it was held that the Statute of Limi-
" tations does not begin to run in the case of an express
" trust, *until the trustee, with the knowledge of the cestui*
" *que trust, has* DISAVOWED *and* REPUDIATED *the trust.* In
" *Hearst* v. *Pujol*, 44 California, 230, the proposition is
" laid down that 'if A conveys to B a tract of land,
"'to be by B afterwards reconveyed to himself, he
"'thereby creates an express trust, which B may ac-
"'cept by accepting the deed'; and also that 'the
"'statute of limitations does not commence running on
"'A's right to a reconveyance until B REPUDIATES
"'*the trust*, and such repudiation is brought to the
"'knowledge of A.' And *Grant* v. *Burr*, 54 Cali-
" fornia, 298, draws the *distinction* between a *deed of*
" *trust* and a mortgage, as to the running of the stat-
" ute of limitations. In that case, the trustee under a
" deed of trust, *long after the notes secured thereby had*
" *become barred by the statute of limitations*, was pro-
" ceeding to sell the land under the power conferred.
" The grantor in the deed sought to enjoin such sale,
" but the injunction was denied, and this ruling was
" affirmed by the Supreme Court. See also *Henry* v.
" *Mining Company*, 1 Nevada, 619; *Bacon* v. *Rives*,
" 106 U. S., 99; *Seymour* v. *Freer*, 8 Wall., 202, in

"which the general proposition is laid down *that the* "*statute of limitations has no application to an express* "*trust* where there is no disclaimer. In the case at "bar there was no disclaimer on the part of the trus- "tee, no repudiation of the trust. He never asserted "title in himself as against any beneficiary."

Gisborn *v.* Charter Oak Ins. Co., 142 U. S., 337, 338.

"As a general rule, doubtless, length of time is no "bar to *a trust clearly established*, and express trusts are "not within the statute of limitations, because the pos- "session of the trustee is presumed to be the posses- "sion of his *cestui que trust*. *Prevots* v. *Gratz*, 6 Wheat, "481, 497; *Lewis* v. *Hawkins*, 23 Wall., 119, 126; *Rail-* "*road Co.* v. Durant, 95 U. S., 576. But this rule is "* * * subject to *this* qualification, that time begins "to run against a trust *as soon as it is openly* DISAVOWED "*by the trustees, insisting upon an adverse right and* "*interest which is* CLEARLY *and* UNEQUIVOCALLY *made* "*known to the cestui que trust;* as when, for instance, "such transactions take place between the trustee and "the *cestui que trust* as would in cases of tenant in "common amount to an *ouster* of one of them by the "other."

Speidel v. *Henrici*, 120 U. S., 386.

In a very recent decision this learned Court applied the same principle to still another class of cases, recognized as analagous because presenting the essential feature of *the Government's having had deposited in the Treasury, pending final disposition of the same, sums of which it (the Government) had had occasion to take, or keep, possession and custody, provisionally, as a quasi-"trustee" for the person or persons who should become, or prove to be, entitled to receive the same.*

In the case referred to (*U. S.* v. *Wardwell*, 172 U. S., 48) the statutory provisions directing the "depositing" in the Treasury, *by the* TREASURER (*nota bene*) of amounts for which cheques, &c., have been made out, but which had remained *uncalled for* more than three

years, were held by this learned Court to establish such a relation between the Government and the parties entitled to such moneys, as must be put an end to by an open and *communicated* DISAVOWAL and *repudiation* by the Government, before the statute of limitations can begin to run.

" Section 1069, Revised Statutes," says Mr. Justice Brewer, speaking for the Court, " is not merely a stat-" ute of limitations but also jurisdictional in its nature. " * * * Counsel for the Government contend that " the claim against the United States first accrued in " 1869, when the cheques were issued, or, if not then, " at least in 1872, when they were lost or destroyed, " and, therefore, this being *twenty four* years before " the commencement of this suit, that the claim was " barred. *If there were nothing to be considered but* " *the single section referred to*, it would be difficult to " escape this conclusion of counsel."

" It is further contended that Sections 306, 307 and " 308 " (the provisions above referred to) " relate to " what is simply a matter of bookkeeping, and do not " in any manner change the scope of the liability of " the Government. *But we are of opinion that they* " *mean something more.* While it *may* be that they " do not provide for the creation of an express trust, " liability for which, according to general rules, con-" tinues until there is a direct repudiation thereof, YET " *they contain a promise by the Government to hold the* " *money thus covered into the treasury for the benefit of* " *the owner until such time as he shall call for it.* This " is a continuing promise, and one to which full force " and efficacy should be given" (p. 52).

" * * * The deposit by the Treasurer is not of a " gross amount to be applied to *any* claims that may " arise, but of the amount due for certain specified " cheques and drafts. In other words, the purpose " of the Government by this statute is to secure " to each party who holds (*unpresented*) Government " paper the amount thereof, to place it in " the Treasury to his credit, and to prescribe a " method by which whenever he wishes he can ob-

" tain it. *No time is mentioned within which he* " *must apply for a warrant or after which the money* " *is forfeited to the Government.* The ordinary rules " for the maturity of negotiable paper do not control. " Congress has directed that the money *already once* " *appropriated and chequed against*" (but uncalled for more than three years) "shall be placed in the " Treasury and held subject to the call of the party " for whose benefit it has been so appropriated and " chequed. *There is* NO OCCASION *for suit until after* " *his application for a warrant is refused.* When the " contract created by the promise made in Section " 308 is *broken, then* a claim for the breach of such " contract first accrues, then the limitation prescribed " by Section 1069 begins to run. There is thus no " conflict with that section, its full force is not im- " paired " (p. 53).

" *In this connection it may not be amiss to notice* " *those authorities in which it is held that upon the or-* " *dinary deposit of money with a bank no action will* " *lie until a demand has been made by cheques or* " *otherwise, and that hence the statute of limitations* " *will not begin to run until after a refusal to pay on* " *such demand*" (citing cases, p. 53).

" * * * The rule (as to bank deposits) finds sup- " port in the decisions of many courts of the highest " standing. *It is not inconsistent with the proposition* " *laid down by this Court* in *Marine Bank* v. *Fulton* " *Bank*, 2 Wall., 252, and often reaffirmed, *Phœnix* " *Bank* v. *Risley*, 111 U. S., 125, and cases cited in " opinion, to the effect that the relation between a " bank and its depositor is that of debtor and creditor " and nothing more, for *that proposition throws no* " *light upon the question* WHEN *the debt of the debtor* " *becomes* DUE *and when the statute of limitations* " *begins to run.* Neither is it pretended that the " relation of the United States was that of a bank and " depositor, *but the reasoning of the authorities cited* " *strengthens the conclusion that when Congress declared* " *that this money should be covered into the Treasury to* " *the credit of the plaintiff, and that she should, on pres-*

"*entation of the cheques to the proper officer of the Treas-*
"*ury, be entitled to a settlement of an account and the*
"*issue of a warrant; it was the intention to recognize a*
"CONTINUING OBLIGATION—one which was available to the
"plaintiff at any time she saw fit, that it was a promise
"which was not broken until after demand and re-
"fusal."

"*But authority more in point is not wanting to sus-*
"*tain these views.* The direct tax act of Aug. 5, 1861,
"c. 45, 12 Stat., 292, provided in the thirty-sixth sec-
"tion, that, in case of a sale of real estate, and a *sur-*
"*plus* remaining after satisfying the tax, costs, &c.,
"such surplus should be paid to the owner, or if he be
"not found, 'then such surplus shall be deposited in
"the Treasury of the United States, to be there held
"for the use of the owner, or his legal representative,
"until he or they shall make application therefor to
"the Secretary of the Treasury, who, upon such appli-
"cation, shall, by warrant on the Treasury, cause the
"same to be paid to the applicant.' In *United States*
"v. *Taylor*, 104 U. S., 216, the owner did not apply for
"the surplus until more than six years had elapsed from
"the closing up of the sale and the deposit of the
"money in the Treasury, and it was held that section
"1069 did not bar his action * * * This was re-
"affirmed in *United States* v. *Cooper*, 120 U. S., 124.
"Counsel distinguish those cases from this in that there
"the money *came* into the Treasury subject to an *ex-*
"*press* trust created by the act of Congress which
"*directed* that it be there held for the benefit of the
"owner, while here in the first instance there was a
"written promise by the Government, *a promise for*
"*which an appropriation had been made and upon*
"*which a cause of action existed.* But while there is a
"difference, we *do not think it* SUFFICIENT *to create a*
"*different rule or measure of liability.* There is *no*
"*new deposit* when a check is certified, but as shown
"by the opinion in *Girard Bank* v. *Bank of Penn*
"*Township, supra, this fact works no change in the*
"*rule.* Whether the money to satisfy this liability
"was *paid in by some third party* or *already held*

"*by the Treasurer;* whether there was or was "not any *prior* liability on the part of the "Government, in each case *there was a declaration by* "*Congress that the money thus received or covered into* "*the Treasury should there be held for the benefit of and* "*subject to the call of the owner, and no time was spe-* "*cified within which such call must be made.* THIS "was a distinct and separate promise, creating a new "liability, and the *claim* accrued when this new lia- "bility *matured.* It matured when the claimant pre- "sented her cheques and, calling for warrants, were "refused them."

United States v. *Wardell*, 172 U. S., 52, 55-58.

That in principle, the case now at bar is strictly analagous to those dealt with in the decisions cited, there would seem to be no room to doubt, especially when it is kept in mind that, as this learned Court declared in the *Taylor* case above cited, "*a construction consistent with* GOOD FAITH *on the part of the United States should be given to these statutes* (104 U. S., 221, *foot of page*).

The statutory direction to deposit in the Treasury the proceeds of prize property, "subject to *the order of the court in the particular case,*" can have had only one object and meaning—*i. e.*, that the moneys should be held in the custody of the Treasurer until paid out to *the parties whom the court's decree shall finally point out as the persons entitled.* The only alternative to this would involve the ridiculous assumption that the statute may have contemplated the Court's "ordering" any *other* disposition of the funds than payment to those found to be entitled. "*No time was limited*" *within which such payment, on the* "*court's order,*" *should be actually secured or demanded, or after which* "*the moneys in question would be forfeited to the Government.*"

If there is any difference in the equities, indeed, the advantage would seem to lie on the side of the innocent owner whose property was forcibly and unlawfully seized by the Government's war vessel, *sold* by

the U. S. Marshal (under most unfavorable conditions, of course) and the meagre "proceeds" so obtained *deposited in the Treasury under a "positive mandate" of Congress compelling this to be done.* Surely there is better consideration here for a "continuing promise" to such a despoiled owner, than there was in the case of *delinquent land owners* whose delinquency forced the Government to have the land *sold for taxes*, or even in the case of creditors *to whom cheques or warrants had been issued* but who had *for more than three years* neglected to *cash* the same (as they could have done in the ordinary course of business).

Respectfully, but earnestly, and with absolute frankness, we must PROTEST against the misguided official or personal zeal which would lightly place the Government of the United States in the attitude—CLEARLY NOT "*consistent with good faith*"—of *pleading the 'Statute of Limitations'* to escape, *under such circumstances*, the plain obligation TO PAY OUT *again* the *whole* of the "proceeds" which *by force* it procured the deposit of in its own Treasury, "subject to the order of the Court in the particular case." *That* Court and *this* Court condemned the seizure of the *Teresita* as unwarranted, and ordered restitution. The balance we now claim has *never been paid* under that order. The statute *gave no warning* that payment, under the Court's order, must be demanded *within any given time.* As a matter of fact, *until after 1882* we were receiving installments of the sum due us, and the Government had in no way signified any intention to repudiate its obligation. As this Court said in the opinions cited,—"there was *no occasion* for a suit." Within "six years" from the day when the Government stopped paying us, the suit was brought.

Is the United States really willing, for the sake of the petty sum involved, permanently to take the position imputed to it by the District Attorney?

As if to stamp as undeniable the analogies to which we appeal, this learned Court has spoken of the Government as holding prize property "IN TRUST *for those*

who, by the decree of the Court, may have the ultimate right to it."

Harlan v. *United States* ('*The Nassau*'), 4 Wall, 635.
Collins v. *The Florida*, 101 U. S., 37.

In any aspect of the case, the obligation with respect to the fund so "had and received" by the Government, had to be openly repudiated and disavowed, to the knowledge of the claimant, before the Statute of Limitation began to run.

III.

The objection made to the judgment of the Circuit Court (the reversal of which is now under review) on the ground that in computing the claimant's damages the Circuit Court took into consideration the length of time during which the wrongful withholding of the balance due continued, and so made the damages larger by an amount which it called "interest," may not be so certainly a sound objection, as the learned District Attorney seems to have deemed it in the Court below (the Court itself did not refer to it). But even assuming, for the sake of the argument, that the objection is really a sound one, and that the Circuit Court erred in computing into the sum allowed as damages the amount which it called "interest," the circumstances would not, in and of itself, require or justify the judgment of the Circuit Court of Appeals ordering "judgment in favor of" the United States. At the utmost, the recognition of the alleged error as to "interest" need (and should) have led only to a reduction of the amount of the judgment to the extent of the sum improperly allowed.

1. That the objection to the allowance of the so-called "interest" under the circumstances, may not be so *certainly* a *sound* objection, as it has been claimed to be, may perhaps sufficiently for the purpose of this argument, appear from the following considerations:

a. The necessary consent of Congress to the allowance of what in this case has been *called* "interest,"

may be given in the form of a statutory permission to recover "*damages*" from the United States.

"It has been established, as a general rule, in the "practice of the Government, that interest is not al- "lowed in claims against it. * * The only "*recognized* EXCEPTIONS are, where the Government "*stipulates* to pay interest and *where interest is given* "*expressly by an act of Congress*, EITHER *by the name* "*of interest* OR *by that of* DAMAGES."

Angarica v. *Bayard*, 127 U. S., 260.

Quoted with approval in

United States v. *North Carolina*, 136 U. S, 218.

In a still later case, this learned Court said:

"The entire sum for which the State (New York) "asked judgment was $131,188.02, of which $91,320.- "84 represented the amount *paid as* INTEREST *on* "*moneys borrowed* for the purpose of raising troops "for the national defence, and for the repayment of "which, with interest at seven per cent., the State "executed its short time bonds. The balance, $39,- "867.18, represented the amount paid as INTEREST on "moneys received by way of loan from the Canal "Fund and supplied by the State for the same pur- "pose. On behalf of the Government it is contended "that payment by the United States of the above sum "of $91,320.84 is prohibited both by the Statute, act "of March 3, 1863, c. 92, 12 Stat., 765, Revi. Stat., "§ 1091, providing that interest shall not be allowed "on any claim up to the time of the rendition of judg- "ment thereon by the Court of Claims, unless upon a "contract *stipulating* for the payment of interest, "and by the general rule based on grounds of public "convenience, that *interest* 'is not to be awarded "against a sovereign government, UNLESS *its* CONSENT "to pay interest has been manifested by an act of its "legislature, or by a lawful contract of its executive "officers.' *United States* v. *North Carolina*, 136 U.

" S., 211, 216; *Angarica* v. *Bayard*, 127, U. S., " 251, 260."

" *The allowance of the $91,320.84 would not contra-* " *vene either the statute or the general rule which we* " *have adverted.* * * * *Liberally interpreted*, it is " clear that the acts of July 27, 1861, and March 8, " 1862, created on the part of the United States, an " obligation to indemnify the States for *any* costs, " charges and expenses *properly incurred* for the pur- " poses expressed in the act of 1861, the title of which " shows that its object was 'to *indemnify* the States " for EXPENSES incurred by them in defense of the " United States.'"

" So that the only inquiry is *whether, within the fair* " *meaning of the latter act, the words* 'COSTS, CHARGES " *and* EXPENSES *properly incurred*,' included INTEREST " paid by the State of New York on moneys borrowed " for the purpose of raising, subsisting and supplying " troops to be employed in suppressing the rebellion. " *We have no hesitation in answering this question in* " *the affirmative.* * * * We cannot doubt that the " INTEREST paid by the State on its bonds, issued to " raise money for the purposes expressed by Congress, " constituted *a part of the* COSTS, CHARGES *and* EXPENSES " properly incurred by it for those objects. * * * " We are of opinion that the claim of the State for " money paid on account of interest to the Commis- " sioners of the Canal Fund, is not one against the " United States for INTEREST *as such*, but is a claim of " costs, charges and expenses properly incurred, * * * " and *is embraced by the act* of Congress declaring that " the States would be indemnified by the General " Government for moneys so expended."

United States v. *New York*, 160 U. S., 619, 621, 624.

b. The act of 1887, under which this proceeding was brought, may fairly be construed as consenting to the allowance of "interest," under the name of "*damages*":

The statute in question (24 Stats at Large, p. 505,

§ 1, Par. "First"), authorizes certain courts to adjudicate "CLAIMS * * * upon any contract, express or implied, * * * or for *damages*, liquidated or unliquidated, in cases not sounding in tort, *in respect of which claims the party could be entitled to* REDRESS against the United States * * * IF *the United States* WERE SUABLE."

Furthermore, though formulating *an elaborate and detailed revision or re-enactment* of the provisions of the Revised Statutes, on the subject of the prosecution of claims against the Government, and though expressly imposing certain other restrictions on the general jurisdiction granted, this statute nowhere adopts or repeats the prohibition of the former statutory system against the allowance of "interest" as an element of damages. (On the contrary, it may be deemed to have expressly *repealed* that prohibition, by the general repeal contained in § 16.) NOR does the *revised* "CLAIMS" SYSTEM in question anywhere intimate that the "damages," or the "redress" which it authorizes is to be *of any other quality or extent or degree* than the "damages" or "redress" obtainable in a similar case against a "suable" defendant. *The* OBVIOUS *suggestion* of the language in which the jurisdiction is conceded, certainly is that the purpose of the enactment was simply *to* WAIVE *the Government's* PRIVILEGE *as a* NON-"*suable*" *sovereign*. A permission, by such a privileged entity, to its own tribunals, to "*hear and determine* CLAIMS" to "damages" or "redress" "in "respect of which claims the party would be entitled to "redress against the United States *if the United States* WERE SUABLE," surely contemplates the allowance of THE "damages" or "redress" which would in a like case be allowed against a "suable"—*i. e.*, an unprivileged defendant. In any case, therefore, in which so-called "interest" is an essential element or factor in the computation of the "damages," or the measuring of the "redress," this statute must (we submit), if fairly construed, be deemed an "*express* giving of interest *by the name of damage*."

In the case of *United States* v. *McKee*, decided in

1875, this Court found a sufficient permission to allow 'interest,' in a statute directing the consideration of the claim to be "governed by the rules and regulations heretofore adopted by the United States in settlement of like cases." The description, in the present statute, of the claims to be adjudicated, as "claims in respect of which the party would be entitled to redress if the United States were suable," at least as cogently implies that the "redress" to be allowed is *the* redress to which the party would be entitled *in the case referred to—i. e.*, the case of a "suable" *non*-"sovereign" defendant.

U. S. v. *McKee*, 91 U. S., 450, 451.

2. But even assuming, for the sake of the argument, that the objection is really a sound one, and that the Circuit Court erred in *computing into the sum allowed as "damages"* the amount which it called "interest," this circumstance would not, in and of itself, require or justify the judgment of the Circuit Court of Appeals ordering *"judgment in favor of" the United States.* At the utmost, the recognition of the alleged error as to "interest" need (and should) have led only to a reduction of the amount of the judgment to the extent of the sum improperly allowed.

IV.

The judgment under review should be reversed, and judgment ordered for the claimant, in accordance with the decision of the Circuit Court.

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